

SHIRLEY BASSETT,)
)
 Plaintiff)
)
 v.) ***Civil No. 93-62 B***
)
 DONNA E. SHALALA,)
 Secretary of Health)
 and Human Services,)
)
 Defendant)

¹ This action is properly brought under 42 U.S.C. 405(g) and 1383(c)(3). The Secretary has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 12, which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on July 19, 1993 pursuant to Local Rule 12(b) requiring the parties to set forth at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record.

gainful activity since August 3, 1991 and meets the disability insured status requirements from that date at least through December 31, 1995, Findings 1-2, Record p. 18; that she has "severe venous insufficiency of the lower extremities, and osteoarthritis," but that she does not have an impairment or combination of impairments that meet or equal the Listings, Finding 3, Record p.18; that her assertions concerning pain and its impact on her ability to work are not entirely credible, Finding 4, Record p. 18; that she is unable to perform her past relevant work, Finding 6, Record p. 18; that her residual functional capacity for the full range of sedentary work is reduced by her inability to perform jobs in which she is unable to stand up periodically and by her inability to work in adverse weather conditions, Finding 7, Record p. 18; that, considering her age (46), education (high school equivalence), vocational background (semi-skilled and skilled) and exertional capacity for sedentary work, application of 20 C.F.R. 404.1569, 416.969 and Rule 201.22 of Appendix 2, Subpart P, 20 C.F.R. 404 (the "Grid") directed a conclusion that the plaintiff was not disabled, Findings 8-11, Record p. 19; that although her additional nonexertional limitations do not allow her to perform the full range of sedentary work, using the Grid as a "framework for decisionmaking,"² there are a significant number of jobs in the national economy that she could perform, Finding 12, Record p. 19; and that, therefore, she was not disabled at any time through the date of the decision, Finding 13, Record p. 19. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final determination of the Secretary. 20 C.F.R. 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Secretary's decision is whether the determination made is

² Where a claimant has nonexertional impairments, use of the Grid at Step Five may be appropriate if the nonexertional impairment does not significantly affect the ability to perform a full range of jobs at the appropriate exertional level. *Heggarty v. Secretary of Health & Human Servs.*, 947 F.2d 990, 995-96 (1st Cir. 1991). If the occupational base is significantly limited by a nonexertional impairment, the Secretary may not rely on the Grid to meet her burden of showing that there is other work the claimant can do. *Id.* at 996. Usually, the testimony of a vocational expert is required. *Id.* However, even if a nonexertional impairment is considered significant, the Grid is relevant and can be relied upon to yield a finding as to disability if the impairment reduces the occupational base only marginally. *Id.* Despite a finding of nonexertional impairments, *see* Record p. 19, the plaintiff does not contest the Administrative Law Judge's use of the Grid.

supported by substantial evidence. 42 U.S.C. 405(g), 1383(c)(3); *Lizotte v. Secretary of Health & Human Servs.*, 654 F.2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

Because the Secretary determined that the plaintiff is not capable of performing her past relevant work, the burden of proof shifted to the Secretary at Step Five of the evaluative process to show the plaintiff's ability to do other work in the national economy. 20 C.F.R. 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence supporting the Secretary's findings regarding both the plaintiff's residual functional capacity and the relevant vocational factors affecting her ability to perform other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 293-94 (1st Cir. 1986); *Lugo v. Secretary of Health & Human Servs.*, 794 F.2d 14, 16 (1st Cir. 1986).

The Administrative Law Judge found that the plaintiff's residual functional capacity for a full range of sedentary work was reduced by her inability to perform jobs which do not permit her to stand up periodically, but that there were still a significant number of jobs in the national economy that she could do. His conclusion was derived, in part, from the answer to a hypothetical question he posed to the vocational expert. The question was based on a 45-year old person with a GED who "could engage in a full range of, at least extremely wide range of sedentary work, that is with the exception that she be able to stand up . . . periodically, to move about, to [] assist in circulation and comfort . . . over an eight hour period." Record pp. 68-69.

A hypothetical question must accurately reflect evidence in the record. *Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982). In order for a vocational expert's answer to a hypothetical question to be relevant, "the inputs into that hypothetical must correspond to conclusions that are supported by the outputs from the medical authorities." *Id.*

A full range of sedentary work requires the ability to lift no more than ten pounds, to lift and carry small articles on occasion and to sit for approximately six hours per eight-hour workday. Walking and standing may be required, but generally not in excess of two hours total. *See* 20 C.F.R. 404.1567(a), 416.967(a); Social Security Ruling 83-10, reprinted in *West's Social Security Reporting Service*, at 29 (1992). Someone who cannot remain seated "most of the day" and who "must often interrupt [her] sitting with standing for significant periods of time" is not capable of sedentary work. *Thomas v. Secretary of Health & Human Servs.*, 659 F.2d 8, 11 (1st Cir. 1981); Social Security Ruling 83-12, reprinted in *West's Social Security Reporting Service*, at 39 (1992). At issue is whether the plaintiff has the residual functional capacity to sit within the range included in the hypothetical questions, considering a diagnosis of osteoarthritis that appears in her medical records.

Dr. Kellogg, the medical advisor who testified at the hearing, had examined the record but not the plaintiff. He stated that the impairments that were documented were "venous insufficiency, secondary to varicose veins of both lower extremities," complicated by an ulcer on the ankle that had since healed and edema of the feet and legs. Record pp. 62-63. He stated that her testimony that the edema became worse in late afternoon and evening was credible and typical of chronic venous insufficiency. *Id.* p. 63. He alluded to unexplained foot, leg and back pain that may or may not be related to her varicose veins and was to be evaluated by Dr. Cook, a vascular surgeon. *Id.* pp. 63-64.³ Dr. Kellogg's residual functional capacity determination was that the plaintiff would be restricted in walking because of her pain and would be limited to sitting for periods of up to two hours after which she would need to change her position, *i.e.*, stand up, for a "couple of minutes" to improve her circulation. *Id.* Although limited to walking only a "couple hundred yards," she could lift and carry up to 25 pounds occasionally and ten pounds repetitively. *Id.* p. 64. Dr. Kellogg specifically excluded osteoarthritis in arriving at the residual functional capacity because Dr.

³ I note that there is no report from Dr. Cook in the record.

Austin's notes referred only to a history of osteoarthritis but did not specify a location in the body. *Id.* p. 65. He stated that the plaintiff should be evaluated for peripheral vascular disease. *Id.* However, with the exception of an effect on ability to tolerate cold weather, he indicated that such a finding would not alter his opinion of her residual functional capacity, but only of her treatment and prognosis. *Id.* pp. 66-67.

A letter written by Dr. Austin, the plaintiff's treating physician, indicates a "long history of problem with swelling in her ankles due to severe varicose veins." *Id.* p. 148. He advised against her performing any work requiring prolonged standing or walking, as it would exacerbate the chronic swelling and pain in her feet. *Id.* He had previously diagnosed a venous stasis ulcer and venous insufficiency. *Id.* p. 154. Dr. Austin's progress notes nowhere indicate that he treated the plaintiff for osteoarthritis. This diagnosis appears in the progress notes of Scott Withers, a physician's assistant in Dr. Austin's office. *Id.* pp. 149, 152. Withers noted a secondary diagnosis of osteoarthritis and treated the plaintiff with Voltaren⁴ 75 mg. to be taken twice a day. *Id.* p. 152. She reported that this "helped her hip pain markedly" and, although she continued to have a rubbing feeling in her hips, there was now no pain. *Id.* p. 152. Withers stated that the plaintiff could sit for unlimited amounts of time with standing limited to 45-50 minutes of every hour. *Id.* p. 149.

The residual functional capacity evaluation performed by Dr. Reynolds, a nonexamining, nontestifying physician, noted both venous insufficiency and osteoarthritis, but stated that the plaintiff could sit about six hours of an eight-hour workday and could stand or walk at least two to four hours of an eight-hour workday. *Id.* pp. 141, 147. Dr. Yindra, another nonexamining, nontestifying physician, determined a similar residual functional capacity which considered the plaintiff's edema but not osteoarthritis. *Id.* p. 133.

⁴ Voltaren is a nonsteroidal anti-inflammatory drug used in the treatment of osteoarthritis. *Physicians' Desk Reference* at 1042 (46th ed. 1992). It also has analgesic properties. *Id.*

The plaintiff testified that she is unable to work because she cannot stay on her feet very long due to pain in her feet and legs. *Id.* p. 32. She experiences pain on prolonged walking. *Id.* p. 35. She can sit for an hour or two before she has to get up. *Id.* p. 37. She described pain in her lower back and hips when sitting for 30-45 minutes. *Id.* p. 44. Her back becomes stiff after sitting. *Id.* p. 43. Her hip is most bothersome at night, but she is "all right" as long as she takes her Voltaren. *Id.* p. 34.

Based on the plaintiff's testimony and the medical record available to him, the medical advisor's determination of residual functional capacity is reasonable. An administrative law judge must determine what evidence he credits in order to pose a hypothetical question that will be relevant and helpful. *Torres v. Secretary of Health & Human Servs.*, 870 F.2d 742, 745 (1st Cir. 1989). If a claimant finds a hypothetical question inadequate, she may pose her own. In fact, the plaintiff did so in her question to the vocational expert, including the assumption that she could only sit for 30-45 minutes and then had to get up and move around for five to fifteen minutes. Record p. 70. The plaintiff's hypothetical question also included an assumption that she would have to miss one to three days of work a month because of pain.⁵ *Id.*

The Administrative Law Judge held the record open for further submissions. Dr. Austin's subsequent report, in the form of a brief letter, confirms that the plaintiff has "arthritis involving her hips" which "contributes to her overall impairment" and would "make it difficult for her to sit still for prolonged periods of time without having breaks to get up and move about. Sitting uninterrupted for six hours would certainly not be appropriate." *Id.* p. 183. The plaintiff believes that the Administrative Law Judge should have forwarded the letter to Dr. Kellogg with interrogatories inquiring as to the effect of osteoarthritis on her residual functional capacity. *See* Plaintiff's Statement of Specific Errors at 5. At oral argument, she suggested that instead of doing so, the Administrative Law Judge imposed his own interpretation that there were no further

⁵ There is nothing in the record that indicates that this would be the case.

limitations on her residual functional capacity. While an administrative law judge is not qualified to assess residual functional capacity based on a bare medical record, he is not precluded from rendering a common sense judgment about residual functional capacity as long as he does not exceed the limits of a lay person's competence. *Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 329 (1st Cir. 1990). The contents of the letter are well within the scope of a lay person's understanding. Further, there is nothing in the report that contradicts the medical advisor's opinion or the validity of the hypothetical question or that adds new information. It is reasonable to conclude from Dr. Austin's opinion that the plaintiff has the residual functional capacity to do sedentary work which provides the opportunity to stand and move around periodically. Thus, reading Dr. Austin's report in the manner most favorable to the plaintiff and integrating it with the medical advisor's testimony, I conclude that the hypothetical question fairly reflects the medical evidence.

For the foregoing be ***AFFIRMED***.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 5th day of August, 1993.

***David M. Cohen
United States Magistrate Judge***